IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, MISSISSIPPI
FIFTH JUDICIAL DISTRICT

STATE OF MISSISSIPPI **Plaintiff**

v. ***Cause No. 2003-0071-CR***

CURTIS GIOVANNI FLOWERS **Defendant**

MOTION TO PRECLUDE RETRIAL AND DISMISS THE INDICTMENTS WITH PREJUDICE

Comes now Defendant, Curtis Giovanni Flowers, who has endured six trials for the same offense, and now faces an unprecedented seventh trial, and respectfully moves this Court to dismiss the indictments against him with prejudice pursuant to the double jeopardy clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. The circumstances necessitating such an order are described below.

I. Relevant background.

Curtis Flowers has stood trial six times since 1997 for the same alleged offenses. There has never been any physical or forensic evidence connecting Flowers to the crime; the motive and methods ascribed to Flowers by the prosecution are objectively improbable; the witnesses relied upon to make up the circumstantial case for guilt have by turns been contradictory, unbelievable, or non-probative; and the prosecution has relentlessly excluded African-Americans from jury service. Notwithstanding the shortcomings of its evidence and the unseemliness of its tactics, however, the prosecution has stayed committed to convicting (and executing) Flowers and has been afforded extraordinary leeway to experiment and refine its attack despite four

reversals for misconduct and two guilt-or-innocence phase hung juries. Undersigned counsel's extensive research has revealed no other American criminal case, capital or not, in which the defendant has been forced to run the same gauntlet seven times on account of the prosecution's chronic inability to succeed within the rules.[1]

The prosecution gained the upper hand during Flowers' first three trials by conscious resort to a set of tactics the Mississippi Supreme Court would later condemn as reversible misconduct. The first such tactic – employed at the first and second trials – was to ostensibly go forward against Flowers for only one of the four homicides while inflaming the jurors with references to the other three homicides. This strategy offered prosecutors the benefit of holding the other charges in reserve in case a jury proved unwilling to convict, but the Mississippi Supreme Court found it "egregious," *Flowers v. State*, 773 So. 2d 309, 321 (Miss. 2000) (*Flowers I*), and "improperly prejudic[ial]," *Flowers v. State*, 842 So. 2d 531, 538 (Miss. 2003) (*Flowers II*), and reversed both judgments. The first two trials also featured other underhanded tactics, some adjudicated during the direct appeals, some not. In the first trial, for example, the prosecutors were found to have acted "in bad faith" during improper cross-examination of a defense witness. *Flowers I*, 773 So. 2d at 328-30. And in the second trial, the prosecution was caught having "repeatedly argued facts not in evidence" while attempting to repair damaging holes in its proof. *Flowers II*, 842 So. 2d at 538, 555-56. Moreover, although not reached or decided in either case, in both trials the prosecution used peremptory strikes against literally every African-American venireperson tendered for a seat on the juries.[2]

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[1] The closest capital case is that of Curtis Kyles, who was tried five times by the State of Louisiana. After the fifth attempt ended in a mistrial, the prosecution gave up. *See* J. Gill, *Murder Trial's Inglorious End*, The New Orleans Times-Picayune, February 20, 1998, B7; *see also Kyles v. Whitley*, 514 U.S. 419 (1995) (granting federal habeas corpus relief from conviction returned at Kyles' second trial due to prosecutorial misconduct).

[2] Between them, the first two trials saw the prosecution peremptorily remove all ten African-Americans who survived qualification and came up for seats on the jury. In the first trial this tactic resulted in an all-white jury. See Clerk's Papers 1656. In the second trial the judge disallowed one of the prosecution's strikes after finding it had

Rebuked but undeterred, the prosecution pressed ahead with a third trial, and once again did its best to ensure that the African-American defendant would be tried by an all-white jury. This time, however, that effort was more conspicuous than it had been before, as the District Attorney used all fifteen of his peremptory strikes against African-Americans, which yielded a jury of eleven whites and one African-American (seated only after the State ran out of strikes). While this tactic produced the desired result at trial – another conviction and death sentence – the victory was again short-lived. On direct appeal the Mississippi Supreme Court declared that the jury selection record presented "as strong a prima facie case of racial discrimination as [it] ha[d] ever seen in the context of a *Batson* challenge," *Flowers v. State*, 947 So. 2d 910, 935 (Miss. 2007) (*Flowers III*), and went on to hold that the record "evince[d] an effort by the State to exclude African-Americans from jury service," *id.* at 937. Before reversing the convictions and death sentence against Flowers for the third time, the state court justices further warned that the magnitude of the prosecutors' misconduct had left them "inclined to consider" "abolishing the peremptory challenge system as a means to ensure the integrity of our criminal trials." *Id.* at 939.

The fourth trial saw a partial change in prosecution tactics. In contrast to the earlier proceedings, this time the prosecutors elected to try the case non-capitally. Among other things, this eliminated the step of "death-qualifying" prospective jurors, and with it the opportunity to remove a disproportionate number of African-Americans for "cause." While the prosecutors sought to compensate by using all eleven of the peremptory strikes they exercised against African-Americans, the resulting jury – seven whites and five African-Americans – was far more reflective of the community than prior juries had been. *See* Clerk's Papers 1667-68. After hearing the evidence, the jurors were unable to reach consensus on the question of Flowers' guilt

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been racially motivated; the resulting jury was made up of eleven whites desired by the prosecutors plus the lone African-American they had been judicially prevented from removing. See Clerk's Papers 1662.

and a mistrial was declared.[3] While the available record concerning the fifth trial is sparse, that one also ended in a mistrial when the jury was unable to reach a unanimous verdict at the guilt-or-innocence phase. *See* Clerk's Papers 1891.

Flowers' sixth trial, like all but the fourth, proceeded as a capital case and largely marked a return to prosecution tactics that had been utilized in earlier trials. For example, while the District Attorney did adjust his jury selection tactics to lessen their vulnerability to a *Batson* objection – *e.g.*, by aggressively questioning African-Americans to generate challenges for cause and facially plausible bases for peremptory challenges – he still exercised strikes against five of the six African-Americans tendered for consideration, and managed to seat a jury containing eleven whites out of an original venire that was 42% African-American. Similarly, although he had been specifically condemned in *Flowers II*, *supra*, for misrepresenting key evidentiary matters during summation, the District Attorney engaged in the same brand of misconduct – even going so far as to misrepresent some of the very same facts concerning the same gaps in the State's evidence – at the sixth trial. *See Flowers v. State*, 240 So. 3d 1082, 1154-59 (Miss. 2017) (King, J. dissenting). The revival of the prosecution's strategy from the first three trials brought a familiar result: Flowers was once again convicted and sentenced to death.

The Mississippi Supreme Court affirmed the sixth conviction (and death sentence) over three dissents. *Flowers v. State*, 158 So. 3d 1009 (Miss. 2014), *cert. granted, judgment vacated*, 136 S. Ct. 2157 (2016). However, that decision was ultimately overturned by the United States Supreme Court on the ground that the prosecution had once again violated *Batson v. Kentucky*, 476 U.S. 79 (1986). Seven justices agreed that the prosecution's aggressive questioning and use

[3] Had the fourth jury returned a conviction, the direct appeal likely would have featured yet another claim of prosecutorial misconduct, this one involving false testimony by a prosecution expert witness whose own notes contradicted what she said under oath about a contested issue concerning the appearance of an automobile. See Clerk's Papers 1903.

of peremptory strikes at Flowers' sixth trial demonstrated a "relentless, determined effort to rid the jury of black individuals." *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2246 (2019) (*Flowers VI*). The opinion further states that in excluding black jurors from the first through sixth trials, "[t]he State appeared to proceed as if *Batson* had never been decided." *Id.* at 2246. Having already endured six trials, four appellate reversals, and two hung juries, Flowers now faces the prospect of a seventh trial.

II. A seventh attempt to convict Flowers of the same offense would violate the Double Jeopardy Clause of the Fifth Amendment.

a. Relevant legal principles

The Double Jeopardy Clause of the Fifth Amendment prohibits the state from putting any person "twice ... in jeopardy of life or limb," thus protecting individuals from "the hazards of trial more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 185, 187 (1957). Justice Black summarized the rationale behind the prohibition:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id at 187-88.

Nonetheless, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). The Supreme Court has stopped short of "a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury." *United States v. Jorn*, 400 U.S. 470, 480 (1971). When a mistrial has been declared due to a hung jury, double jeopardy is not violated by retrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). The

Court has also stopped short of the other extreme, an unlimited privilege of retrial following mistrial. Thus, for example,

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars trial where "bad faith conduct by judge or prosecutor," ... threatens the "harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant.

United States v. Dinitz, 424 U.S. 600, 611 (1976) (citations omitted).

b. Argument

The Double Jeopardy Clause provides protection against the overwhelming resources and power of the state. Thus, while retrial is not per se precluded by a mistrial, *Perez* "did not hold that this right of the state to retry a defendant when the jury could not agree [on a verdict] could not be abused." *Preston v. Blackledge*, 332 F. Supp. 681, 685 (E.D.N.C. 1971). Because "repeated efforts to convict an individual for an alleged offense enhance the possibility that even though innocent he may be found guilty, . . . [a]t some point such pursuit must end." *Iowa v. White*, 209 N.W. 2d 15, 16 (Iowa 1973) (finding that a third trial, however, was permissible); *see also*, *United States v. Gunter*, 546 F.2d 861, 866 (10th Cir. 1976) (citing cases) ("[t]here indeed may be a breaking point" where the Double Jeopardy Clause bars another retrial). Here, where the State has tried an individual six times for the same offense – and was determined to have engaged in wrong-doing in four of those trials – the "enhance[ment of] the possibility that even though innocent he may be found guilty," *Green*, 355 U.S. at 187, is greater than the Double Jeopardy Clause permits.

Even in the absence of prosecutorial misconduct, lower courts have found that repeated retrials violate the Double Jeopardy Clause. In *Preston*, a federal habeas court reversed both

defendants' convictions for armed robbery, holding that fifth retrial of the petitioners violated the "prohibition against being twice put in jeopardy." 332 F. Supp. at 688. That court reasoned:

> While this court is aware of the need for the proper administration of justice and recognizes and agrees with the principles set forth in *Perez* that there can be a retrial of an accused after a jury has failed to reach a verdict, it does not support the *Perez* principle to the point at which it has been expounded in this particular instance. There is no doubt that such a practice is oppressive, that it creates undue anxiety and insecurity, and that it enhances the possibility that an innocent man may be found guilty . . . to try the petitioners five times is far beyond the allowed exceptions set forth in *Perez*, and also exceeds the limitations on the right to retry an accused subsequently set forth by our Supreme Court.

Id. at 687-688. *See also*, *State v. Moriwake*, 65 647 P.2d 705, 713 (Haw. 1982) (refusing to allow retrial after two deadlocked juries); *State v. Abbati*, 493 A.2d 513 (N.J. 1985) (refusing to allow retrial after two deadlocked juries); *State v. Witt*, 572 S.W.2d 913, 917 (Tenn.1978) (refusing to allow retrial after three deadlocked juries).

Moreover, although the enhancement of the likelihood that an innocent man will be convicted is the primary reason that this Court should find that placing Flowers in jeopardy for a seventh time violates the Double Jeopardy Clause, an additional reason lies in the State's misconduct in four of these trials. The Double Jeopoardy Clause also bars retrial in the face of deliberate prosecutorial misconduct designed to provoke a mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). Here, although the misconduct in *Flowers I*, *II*, *III*, and *VI* was not *designed to provoke a mistrial*, it sought and created an impermissible advantage of another sort: in all four instances it was *designed to illegally enhance the prosecution's chances of conviction* In *Flowers I* and *Flowers II*, the State elected to try the murders singly – clearly to enhance the number of opportunities it would have to obtain a conviction and death sentence. While it could have legally elected to prosecute them all individually, what it could not legally do was present the aggregated evidence of all four homicides four separate times. In *Flowers III*, the State again

sought unfair enhancement of its opportunity to convict, that time by engaging in blatant racial discrimination in selection of the jurors who would determine Flowers' guilt. *Flowers III*, 947 So.2d at 935 (reversing Flowers' third conviction due to "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge"). And at Flowers' sixth trial, the State persisted in excluding black prospective jurors in order to secure yet another conviction. See *Flowers VI*, 139 S. Ct. at 2246 (reversing Flowers' sixth conviction and characterizing the State's effort to exclude black individuals from the jury as "relentless"). Moreover, when the State's first jailhouse informant recanted, the State substituted a second, and when the second recanted, it substituted a third – who now has also recanted. This complete disregard for the reliability of State witness testimony, whether intentional or grossly negligent, also weighs against the legitimacy of its seventh trial of Flowers for the same crimes.

III. Subjecting Flowers to a seventh trial as a result of and despite the prosecution's repeated instancesof racial discrimination and misconduct would violate the Fourteenth Amendment's Due Process Clause.

a. Relevant legal principles

Cognizant of the Supreme Court's jurisprudence applying the Double Jeopardy Clause only in cases involving prior acquittals or qualifying mistrials, some courts have addressed the problem of oppressive retrials using principles of due process and fundamental fairness. *See, e.g.*, *State v. Martinez*, 86 P.3d 1210, 1217 (Wash. Ct. App. 2004) (affirming decision barring retrial while observing that, "[g]overnment conduct may be so outrageous that it exceeds the bounds of fundamental fairness, violates due process, and bars a subsequent prosecution") (citations omitted); *Sivels v. State*, 741 N.E.2d 1197, 1201 (Ind. 2001) ("We agree with the many jurisdictions that hold trial courts have inherent power to dismiss an information with prejudice following mistrials attributable to repeated jury deadlocks, where necessary to uphold guarantees

of fundamental fairness and substantial justice."); *United States v. Rossoff*, 806 F. Supp. 200, 202 (C.D Ill. 1992) ("[T]he court, in its discretion, may dismiss the indictment with prejudice if it determines that a retrial is against the concept of fundamental fairness.") (emphasis in original) (citation omitted); *State v. Abbati*, 493 A.2d 513, 519 (N.J. 1985) ("The anxiety, vexation, embarrassment, and expense to the defendant of continual reprosecution where no new evidence exists is a proper subject for the application of traditional notions of fundamental fairness and substantial justice."); *People v. Thompson*, 379 N.W.2d 49, 55 (Mich. 1985) (acknowledging that, "there may be cases in which repeated retrials after repeated jury deadlock might be so fundamentally unfair as to violate the due process guaranteed by [state law] or the Fourteenth Amendment to the United States Constitution"); *United States v. Ingram*, 412 F. Supp. 384, 385–386 (D.D.C. 1976) (denying reconsideration of order dismissing indictment after two hung juries, and remarking that, "This is, of course, not a case of double jeopardy. It is simply a matter of fair play.") (citation omitted).

In assessing assessing whether multiple retrials violate due process or fundamental fairness, some courts have viewed governmental misconduct as a central part of their analyses. *See e.g. State v. Whiteside*, No. 08AP-602, 2009 WL 1099435, at *6 (Ohio Ct. App. Apr. 23, 2009) (holding that a defendant's third trial did not violate due process where no evidence indicated that the prosecution was motivated by bad faith or that the trial process was unfair); *State v. Cordova*, 993 P.2d 104, 108 (N.M. Ct. App. 1999) (finding no due process violation in a third trial for the same offense where the defendant presented no evidence of prosecutorial abuse of power) (citations omitted); *United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1978) (holding that a defendant's third trial did not violate due process where no evidence indicated prosecutorial harassment); *see also United States v. Wright*, 913 F.3d 364, 387 (3d Cir. 2019)

(reversing the trial court's dismissal of the indictment because there was no evidence of "government misconduct or prejudice to [the] defendant justifying dismissal"). State abuse of judicial proceedings in order to create multiple retrials can undermine a defendant's ability to defend himself or render a new trial intrinsically unfair. *See, e.g United States v. Castellanos*, 478 F.2d 749, 753 n.4 (2d Cir. 1973) (finding no due process violation in a third trial, but noting that a defendant may argue that at some point "trial by attrition" violates due process).

b. Argument

Flowers' half-dozen trials are a study in the tactics and circumstances typifying oppressive prosecutorial misconduct. The first two trials, in which the prosecution insisted upon going forward onr only one of the four separate murder indictments but relied heavily upon inadmissible evidence and argument concerning all four victims, were a naked attempt to secure "a more favorable opportunity to convict." *Dinitz*, *supra*; *see also Flowers I*, 773 So. 2d at 318 (noting prosecutor's opposition to defense motion to consolidate all four cases for trial); *id.* at 325 ("The cumulative pattern of overkill by the prosecutor in repeatedly mentioning the other killings unnecessarily during the guilt phase in our view is far more egregious than that [found to require reversal in another case]."). The third trial was tainted by race discrimination so obvious, intense, and egregious that it drove the Mississippi Supreme Court to the extraordinary step of threatening to eliminate the peremptory strike. *Flowers III*, 947 So. 2d at 939. The fourth and fifth trials ended when juries could not unanimously accept the prosecution's by then well-rehearsed case for guilt. And the sixth trial demonstrated that the prosecution is still committed to a "relentless" effort to win, even at the cost of the most basic constitutional protections. *See Flowers VI*, 139 S. Ct. at 2246. Flowers has repeatedly been forced to run the exhausting gauntlet of unfair trials before juries carefully selected to omit members of his own race, all the while

remaining in prison due to recurring violations of the Constitution. These circumstances demonstrate the very kind of "trial by attrition" prohibited by due process. *See Castellanos*, 478 F.2d at 753 n.4.

CONCLUSION

WHEREFORE, for the foregoing reasons, Flowers respectfully requests this Court enter an order precluding retrial and dismissing the indictment with prejudice for the reasons enumerated herein and as required by the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully Submitted,

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September 19, 2019

CERTIFICATE OF SERVICE

The undersigned attorney for Curtis Giovanni Flowers hereby certifies that he has caused to be mailed by electronic mail and by U.S.P.S. mail, postage prepaid, a true and correct copy of the above motion to:

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This the 19th day of September, 2019

Robert B. McDuff
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